STATE OF MICHIGAN

COURT OF APPEALS

CAROL A. WYNN,

Plaintiff-Appellant,

v

GUY G. WYNN,

Defendant-Appellee.

UNPUBLISHED
April 18, 1997

No. 197402
Wayne Circuit
LC No. 95-519846-DM

Before: Markey, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce entered on August 6, 1996. The trial court awarded physical custody of Lauren Wynn, plaintiff and defendant's daughter, to defendant. We affirm.

Plaintiff contends that the trial court failed to determine whether an established custodial environment existed between her and her daughter before awarding custody of Lauren to defendant. We agree. Upon a de novo review of the record, which this Court may exercise in child custody matters where the trial court failed to determine the existence of a custodial environment, *Underwood v Underwood*, 163 Mich App 383, 389; 414 NW2d 171 (1987), we conclude that no established custodial environment existed. Whether a custodial environment exists is a question of fact that the trial court must address before ruling on the child's best interests. *Ireland v Smith*, 214 Mich App 235, 241; 542 NW2d 344 (1995).

MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides in part:

> The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

An established custodial environment exists "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life and parental comfort. The

age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993). If no custodial environment exists, the trial court may modify a custody order if the petitioning party can convince the court by a preponderance of evidence that it should grant a custody change. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). Otherwise, clear and convincing evidence is necessary to change custody where an established custodial environment exists. *Ireland, supra; Hayes, supra.*

We conclude that there was no established custodial environment between Lauren and plaintiff in the time between leaving the marital home and the trial court's ruling. Although Lauren naturally looked to plaintiff for guidance, discipline, the necessities of life, and parental comfort during this time, Lauren also naturally looked to defendant for these same requirements. Lauren resided with defendant every other weekend from Friday afternoon until the following Tuesday morning and cared for Lauren on Monday nights on the odd weeks. The holidays were split evenly between plaintiff and defendant. Lauren continued to attend Grogan Elementary School in Southgate, which is located behind the parties' marital home where defendant currently resides, while she was living with plaintiff in Dearborn. Lauren was five at the time of trial and had lived in the marital home her entire life until plaintiff and Lauren moved out of the home in June of 1995. Lauren had a strong attachment for the neighborhood surrounding the marital home and had many friends and social opportunities there. Both plaintiff and defendant desired permanent relationships with Lauren.

We hold that no established custodial environment existed with either party at the time of trial because Lauren was equally split between the parties and could have easily considered the marital home as her primary residence while she was living with plaintiff in Dearborn. The facts of the instant case are similar to those in *Breas v Breas*, 149 Mich App 103, 105-108; 385 NW2d 743 (1986), where this Court affirmed the trial court's finding that no established custodial environment existed even though the mother had physical custody pending a divorce but the father exercised frequent visitation, was seeking permanent custody, and the environment provided for the child during the custody proceeding was not permanent. We also see a similarity between this case and *Curless v Curless*, 137 Mich App 673, 676-678; 357 NW2d 921 (1984), where this Court affirmed a trial court's finding of no established custodial environment where the children were staying with the mother pending a divorce, but the father exercised frequent visitation and sought permanent custody in the divorce proceedings.

Because no established custodial environment existed, the trial court was able to modify the custody order if defendant convinced the court, by a preponderance of evidence, that it should grant a custody change. *Hayes, supra.* In the instant case, an ex parte interim order was entered granting temporary custody to plaintiff prior to the trial court's ruling at trial. The interim order did not create or affirm the existence of a custodial environment. *Bowers, supra*. Based upon the following facts, we find that defendant presented sufficient evidence to convince the court by a preponderance of evidence that it should grant a custody change. *Id.*

Defendant had frequent visitation with Lauren throughout the time when plaintiff was awarded temporary custody. He maintained Lauren's bedroom in the marital home, played with her, and helped

her with her scholastic activities. Plaintiff had to drive Lauren to Southgate to attend school. Defendant drove and picked Lauren up from school, which was around the block from the marital home. Defendant obtained proper supervision for Lauren with the assistance of his sisters or a neighbor when he was not available to care for her, and he made sure that Lauren played with other neighborhood children. Although plaintiff equally cared for Lauren, played with her and helped her with scholastic activities, plaintiff admitted that Lauren had not played with any children in the Dearborn neighborhood where they were residing. Upon a de novo review of the evidence, *Underwood, supra*, we conclude that defendant convinced the trial court by a preponderance of evidence that it should grant a custody change, *Hayes, supra,* and that the trial court properly changed responsibility for Lauren's physical custody to defendant.

Plaintiff also argues on appeal that the trial court failed to make express findings of fact for each factor relevant to a determination of the best interest of the child. We disagree. A review of the record below indicates that the trial court carefully considered each of the statutory factors outlined in MCL 722.23; MSA 25.312(3), which defines the "best interests of the child," and made specific findings on the record before granting primary physical custody to defendant.

Plaintiff also argues that some of the trial court's findings were against the great weight of the evidence. We disagree. The trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Ireland, supra.*

We conclude that the trial court's finding that defendant has a slight "edge" over plaintiff as to the love, affection, and emotional ties to Lauren was not against the great weight of the evidence. We also conclude that the evidence supported the trial court's finding that the parties were equal, or even that plaintiff had a slight advantage, as to their ability provide Lauren with food, clothing, medical and other remedial care.

On appeal, plaintiff attempts to introduce evidence not raised at trial that would contradict the trial court's findings as to factors (d) and (e) of MCL 722.23; MSA 25.312(3), i.e., the length of time the child has lived in a stable, satisfactory environment, and the permanence of the existing or proposed custodial home. Plaintiff cannot expand the record on appeal by submitted evidence to this Court that was not before the trial court. MCR 7.210(A); *Long v Chelsea Community Hospital*, 219 Mich App 578, 588; ___ NW2d ___ (1996).

Plaintiff next argues that the trial court erred in denying her motion for a new trial and in failing to permit her to introduce new evidence not admitted at trial that would have aided the trial court's determination regarding the best interests of the child. We disagree. The decision to grant a new trial is within the trial court's discretion and this Court will not interfere unless the abuse of that discretion is palpable. *Bosak v Hutchinson*, 422 Mich 712, 731; 375 NW2d 333 (1985). Great deference is given to the decision of the trier of fact who has heard and observed the testimony. *Id.*

The requirements for newly discovered evidence to support a new trial motion are: (1) the evidence, not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) it

is likely to change the result; and (4) the moving party could not have produced it at trial with reasonable diligence. *Hauser v Roma's of Michigan, Inc*, 156 Mich App 102, 106; 401 NW2d 630 (1986). We hold that the trial court did not abuse its discretion in failing to grant plaintiff's motion for a new trial because the evidence was not newly discovered and plaintiff could have produced it at trial with reasonable diligence. *Hauser, supra.* At trial, plaintiff took issue with defendant's character and criticized his behavior, alleging that he introduced her to cocaine and described incidents where he abused alcohol. Only after the trial had ended and defendant received custody of Lauren did plaintiff seek to present the testimony contained in her sisters' affidavits that were available for introduction at trial. In these affidavits, plaintiff's sisters stated that they observed defendant attempt to influence Lauren's testimony while in the courthouse during trial. Because great deference is given to the trier of fact's determination after hearing and observing the testimony, *id.*, and the trial court's factual findings as to the best interests of the child were not against the great weight of the evidence, we hold that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

Affirmed.

Defendant being the prevailing party, he may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra